MALAYSIAN REPORTS

General Ceramics Manufacturers Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employees Union & Anor

SUPREME COURT (KUALA LUMPUR) – SUPREME COURT CIVIL APPEAL NO 421 OF 1986
LEE HUN HOE CJ (BORNEO), MOHAMED AZMI AND WAN HAMZAH SCJJ
9 FEBRUARY AND 22 OCTOBER 1988

Administrative Law – Order of certiorari to quash award of Industrial Court – Application for – Collective agreement – Purported termination – Payment of annual increment – Jurisdictional error – Industrial Relations Act 1967, ss 14(2)(b), 26(1), 33 & 56

Labour Law – Collective agreement – Purported termination – Payment of annual increment – Accrued rights – Industrial Relations Act 1967, ss 14(2)(b), 26(1), 33 & 56

Civil Procedure – Appeal – No written judgment of lower court – Rules of the Supreme Court 1980, r 62(4)(e)

In this case the appellant company and the respondent union had entered into a collective agreement in 1982 for a period of three years with retrospective effect from 1 March 1981 to 29 February 1984 with a proviso that the agreement shall continue to be in force thereafter unless terminated by either party giving notice of not less than three calendar months in writing and such notice shall not be given before 1 December 1983. The collective agreement provided that 'every employee shall receive an increment on 1 March each year from 1982'. The union purported to terminate the 1982 agreement by a registered letter dated 15 December 1983. The company purported to accept the termination of the agreement. Subsequently the union submitted a fresh proposal for a new collective agreement but no agreement was arrived at. The dispute was referred by the Minister to the Industrial Court, which made an award, deemed to take effect on 1 June 1984.

The award provided that confirmed employees shall receive their annual increment on 1 March of each year. A dispute arose as to the interpretation of this provision. The union took the view that all confirmed employees were entitled to increment for 1 March 1984 and backdated from 1 June 1984. The company disagreed on the grounds that the 1982 agreement had been terminated by the union and the agreement did not provide for the payment of increment for the year 1984. The union applied for a reference under s 33 of the Industrial Relations Act 1967 but this was dismissed as it was held that the application should be for non-compliance under s 56 of the Act. The union thereupon applied under s 56 of the Act and the Industrial Court ordered that the 1984 increment was payable to the workers under the 1982 agreement. The appellant company applied for certiorari to quash the award of the Industrial Court and this was dismissed in the High Court. The appellant company appealed.

Held, dismissing the appeal:

(1) The learned judge was right in holding that the parties to the 1982 agreement intended that every employee who had served the company for not less than six months in the preceding calendar year should receive an increment on 1 March each year from 1982 during the currency of the agreement.

(2) The annual increment due on 1 March 1984 is therefore payable by the company to their confirmed employees. There is accordingly non-compliance by the company of the 1982 agreement within the meaning of s 56 of the Industrial Relations Act.

(3) Where a claim has accrued and a claim is payable during the currency of the agreement, such a claim cannot be disbarred merely because the agreement has expired or been terminated. In the present case, if the right to the 1984 annual increment could be shown to have accrued during the currency of the 1982 agreement, the application for non-compliance would be valid even if the claim itself was made after its expiry.

(4) The 1982 agreement in this case had not been lawfully terminated and the terms of the agreement would continue to be in force until superseded by the new terms of the Industrial Court award, which was deemed to have come into effect on 1 June 1984. The annual increment accruing to the employees on 1 March 1984 must therefore be paid.

(5) Even if the union's registered letter of 15 December 1983 were deemed to be a proper three calendar month notice of termination, the termination would only take effect on 15 March 1984. As such the 1984 annual increment which was due to the confirmed employees on 1 March 1984 would still be payable as it had accrued during the currency of the 1982 agreement.

(6) In the circumstances the Industrial Court did not act without or in excess of jurisdiction when it ordered the company to pay the 1984 increment due to the confirmed employees under the 1982 agreement.

Case referred to

1 *National Union of Hotel Bar & Restaurant Workers* v *Casuarina Beach Hotel Sdn Bhd* [1986] 2 MLJ 17 (distd)

Legislation referred to

Industrial Relations Act 1967 ss 14(2)(b), 26(1), 33, 56
Rules of the Supreme Court 1980 r 62(4)(e)

Appeal from: Originating Motion No A-32-50-86 (High Court, Kuala Lumpur)

TM Varughese for the appellant.
S Achan (*P Kuppusamy* with him) for the respondent.

Cur Adv Vult

Mohamed Azmi SCJ (delivering the judgment of the court): This is an appeal against the decision of Harun J in dismissing the appellant company's application for an order of certiorari to quash the Industrial Court award no 143 of 1986 dated 21 May 1986 (referred to in the court below as 'the third award') in which the company was ordered to make payment of annual increment for the year 1984 under the provision of art 32(b) of a preceding collective agreement of 1982. The appeal is heard without the benefit of a written judgment under the proviso to r 62(4)(e) of the Supreme Court Rules 1980 due to the inability of the learned judge to supply the document despite repeated request. The main issue for determination is whether by the 1986 third award the Industrial Court had no jurisdiction to order compliance with the payment of annual increment to the workers due

and payable on 1 March 1984 after the purported termination of the 1982 collective agreement.

The facts of this case may be stated as follows. On 6 January 1982, the appellant company and the respondent union entered into the 1982 collective agreement for a period of three years with retrospective effect from 1 March 1981 to 29 February 1984 with a proviso under art 30(a) that 'the agreement shall continue to be in force thereafter unless terminated by either party giving not less than three calendar months' notice in writing and such notice shall not be given before 1 December 1983'.

Under the heading of 'wages and annual increments', art 32 makes the following provisions:

(a) Employees will be paid in accordance with the salary/wage structure set out in appendix I or II to this agreement. Each employee will be informed of the salary group appropriate to him.

(b) *Annual increments for 1982 and 1983*

(i) Provided he has served for not less than six(6) months in the preceding calendar year, *every employee shall receive an increment on 1 March each year from 1982* amounting to not less than the normal increment specified opposite his salary grade in appendix I or II to this agreement. However, employee who does not qualify for the annual increment on 1 March, his incremental date shall be on the anniversary date of joining the company. (emphasis supplied)

(ii) Provided that in no case shall any employee's salary under cl (i) above exceed the maximum laid down for his grade in appendix I or II to this agreement.

The union purported to terminate the 1982 agreement by AR registered letter dated 15 December 1983 addressed to the company's general manager in the following terms:

Dear Sir,

Re: Termination of collective agreement

In accordance with cl (a) of art 20 of our collective agreement, we write to serve notice to terminate the collective agreement which is due to expire on 29 February 1984.

We will submit our new proposals soon as it is ready.

Let us have your views.

Yours faithfully,
(sgd)
Kesatuan Pekerja-Pekerja Perkilangan
Keluaran Galian Bukan Logam

The company purported to accept the termination of the agreement on 29 February 1984 in the following reply dated 27 December 1983:

Dear Sir,

Re: Termination of collective agreement

We acknowledge receipt of your AR registered letter dated 15 December 1983.

We hereby accept your notice to terminate our collective agreement on 29 February 1984.

We look forward to receiving your new proposals in due course to commence negotiations.

Yours faithfully,
General Ceramic Manufacturers Sdn Bhd
(sgd)
Lee Yin Fah
General Manager

On 23 February 1984 the union submitted to the company a fresh proposal for a new collective agreement. Of the 32 items in the new proposals, they could not reach agreement on 15 of them. As a result, the dispute was referred by the Minister to the Industrial Court under s 26(1) of the Industrial Relations Act 1967. Award no 63 of 1984 (referred to in the court below as 'the first award') was made on 1 April 1985. Under art 2, the 1984 award 'shall be deemed to have come into effect on 1 June 1984 and shall remain in force for a period of three years expiring on 31 May 1987', subject to the same proviso as in the 1982 collective agreement for the continuance of the agreement thereafter unless terminated by either party by giving not less than three calendar months' notice in writing which must not be given before 1 March 1987. Article 31 of the 1984 award dealing with 'salary and annual increment' provides:

(1) Employees shall be paid in accordance with the salary structure set out in appendix I to this award. Each employee will be informed of the salary group applicable to him.

(2) Confirmed employees shall receive their annual increment on 1 March of each year.

Provided that those with less than 12 months service and those currently receiving their annual increment on other anniversary dates will be given a pro-rata increment (rounded to the nearest dollar) based on the following formula:

$$\frac{\text{Completed months of service}}{12} \times \text{Annual increment}$$

This is followed by art 32 which deals with the manner in which the conversion and point of entry was to be effected as from 1 June 1984 for the purpose of converting all hourly-rated employees to monthly-paid. The subject of 'arrears of pay and allowances' was dealt with by art 33 as follows:

(1) The arrears of pay which shall be adjusted from 1 June 1984 in accordance with art 32 above shall be paid within two months from date of this award.

(2) In respect of any allowances and other fringe benefits granted under this award, the effective date shall be 1 April 1985.

A dispute arose between the union and the company on the interpretation of art 31(2) cited above on the words 'confirmed employees shall receive their annual increment on 1 March of each year'. The union took the view that all confirmed employees were entitled to increment for 1 March 1984 and backdated from 1 June 1984. The company disagreed because firstly, the 1982 agreement was terminated by the union on 29 February 1984 and

therefore money due under the agreement could not be claimed after its expiry, and secondly, the 1982 agreement itself did not provide for payment of increment for the year 1984. Consequently, the union applied for a reference under s 33 of the Industrial Relations Act for interpretation of art 31(2). By award no 21 of 1986 (referred to in the court below as 'the second award') the Industrial Court appears to take the view that the notice of termination of the 1982 agreement issued by the union on 15 December 1983 was insufficient to constitute 'a three calendar month notice' to terminate the agreement on 29 February 1984, despite the acceptance by the company to terminate it on that date. As such the Industrial Court was of the opinion that 'the annual increment due to the employees on 1 March 1984 under the 1982 agreement has to be complied with before award no 63 of 1985 is implemented on 1 June 1984'. The union's application was, however, dismissed on grounds of procedural or technical error in bringing the application for interpretation under s 33 instead of for non-compliance under s 56 of the Act. The union took the cue and filed the suggested application under s 56(1), and under award no 143 of 1986, ie the third award, the Industrial Court ordered on 31 May 1986 that the 1984 increment was payable to the workers under art 32(b) of the 1982 agreement and such increment must be given to them before the conversion to their salary scales under the first award, ie award no 63 of 1985. Compliance was ordered within one month.

We propose to deal in two parts with the appellant's argument of jurisdictional error on the part of the Industrial Court in handing down the third award, ie award no 143 of 1986.

Firstly, the argument that the 1982 agreement did not provide for payment of yearly increment for 1984 is based essentially on the sub-heading of art 32(b) which reads 'annual increments for 1982 and 1983' and therefore seems to suggest that the increment operated only for the two years. From the notes of evidence at p 17 of the appeal record, in dismissing the company's application, Harun J made the following finding:

> Court should have confined itself to the 1982 collective agreement.
>
> Article 32(b) – body of article does not restrict increment beyond 1983 because it provides for increments on anniversary dates of appointment of certain employees.
>
> The proviso (ii) allows increments up to maximum.
>
> Article 33(b) is not intended to be restrictive beyond 1983.
>
> Article 30 also envisaged collective agreement to go beyond 1984.
>
> At most the court made right decision for wrong reason.

We agree with the learned judge that reading art 32 as a whole, there is no doubt on balance that the parties to the agreement intended that every employee who had served the company for not less than six months in the preceding calendar year should receive 'an increment on 1 March each year from 1982' during the currency of the agreement. In our view, the sub-heading of art 32(b) cannot override the clear words in the body of the article itself. If the parties had intended annual increment to be restricted to two years, viz for 1982 and 1983 only, then it would have said so clearly, instead of stating that it is receivable by every eligible employee 'on 1 March each year from 1982'. Further, appendices I and II of the agreement envisaged a period of five-ten years and not merely two years. Reference has been made to art 33(b) of the 1982 agreement which provides:

> The next incremental date for all eligible employees in accordance with art 32(b) shall be 1 March 1982 and thereafter one increment on 1 March 1983.

In our view, art 33 is only for the purpose of calculating the point of entry and conversion under the 1982 agreement, and therefore not relevant for interpretation of art 32. The finding of the Industrial Court which was upheld by the High Court that the 1984 increment is payable under the 1982 agreement is therefore not perverse in the sense that no reasonable person or body of persons could have reached it. We therefore hold that the annual increment due on 1 March 1984 is payable by the company to their confirmed employees. There is, accordingly, non-compliance by the company of art 32(b) of the 1982 agreement within the meaning of s 56 of the Industrial Relations Act.

Secondly, the argument of the company is that since the 1982 collective agreement had expired on 29 February 1984, the Industrial Court would have no jurisdiction to order compliance with any of its terms under s 56. Reference was made to the majority decision of this court in *National Union of Hotel Bar & Restaurant Workers* v *Casuarina Beach Hotel Sdn Bhd.*[1] In that case the complaint under s 56 was for non-compliance with the terms of the terminated collective agreement in respect of 5% additional contribution by the company over and above the statutory rates prescribed by the Employees Provident Fund Act, during the period of re-negotiation with a view to entering a new collective agreement, ie accruing after termination of the agreement. In the absence of a saving or continuation clause, it was held by this court that once a collective agreement had been terminated in accordance with its terms, it ceased to have a binding effect on the parties. It was in this context that the court stated that 'it is inherent in s 56(1) that the complaint to the Industrial Court for non-compliance can only be made during the currency of the collective agreement and not after its termination'. This statement should not be read out of context to mean that the complaint cannot be made for non-compliance after the

expiry of the agreement of a right which has accrued during the currency of the agreement. It is obvious that where a right has accrued and a claim is payable during the currency of the agreement, such a claim cannot be disbarred merely because the agreement has expired or been terminated. In the present case, if the right to the 1984 annual increment could be shown to have accrued during the currency of the 1982 agreement, the application for non-compliance would certainly be valid even if the claim itself was made after its expiry.

Under s 14(2)(b) of the Industrial Relations Act, the period of a collective agreement shall not be less than three years from the date of commencement of the agreement. Thus, under art 30(a) of the 1982 agreement which took effect from 1 March 1981 to 29 February 1984, the requisite three calendar months' notice 'shall not be given before 1 December 1983'. This is to comply with the provisions of s 14(2)(b) of the Industrial Relations Act and to ensure that the agreement would continue for a minimum period of three years from the date of its commencement, and since the three-year period would be completed on 29 February 1984, the three calendar months' notice of termination could not be given before 1 December 1983. Under s 3 of the Interpretation Act 1967, 'month' means a month reckoned according to the Georgian calendar. Whereas a 'calendar month' is a legal and technical term; and in computing time by calendar months, the time must be reckoned by looking at the calendar and not by counting days (see *Stroud's Judicial Dictionary*). Accordingly, since notice of termination was given on 15 December 1983, a three calendar month notice would, if at all, terminate the agreement on 15 March 1984, and the purported acceptance by the company of the termination of the agreement on 29 February 1984 was therefore entirely misconceived and invalid. But the crucial issue here is whether the union's registered letter of 15 December 1983 can constitute a valid three calendar month notice as stipulated in art 30(a) of the 1982 agreement? We do not think that it is a valid notice. In the first place, the notice was given under art 20 and not art 30 of the 1982 agreement. Secondly, even if the letter was accepted as a notice of termination under art 30(a), it was a notice intended to terminate the agreement on 29 February 1984. For termination on that date, the notice ought to be given on 1 December 1983 for the purpose of compliance with the requisite 'three calendar months' notice'. The notice, therefore, did not comply with the provisions of art 30(a), and since the result would be detrimental to the workers, the defect could not be cured or waived by the company's acceptance of it. In the absence of any provision to the contrary, the 1982 agreement 'shall continue to be in force' after 29 February 1984 although the agreement by that date had already been in force for three years – the minimum period required by s 14(2)(b) of the Industrial Relations Act. Further, for the purpose of entering into a fresh negotiation, the terms of the 1982 agreement (unlike other collective agreements that have come before us) did not require the termination of the agreement as a condition precedent. Accordingly, the correct legal position is that the 1982 agreement had not been lawfully terminated and the terms of the agreement would continue to be in force until superseded by the new terms of the Industrial Court award no 63 of 1985 (ie the first award) which by art 2 of the first schedule 'shall be deemed to have come into effect on 1 June 1984'. The annual increment accruing to the employees on 1 March 1984 under art 32(b) must therefore be paid.

As referred to earlier, even if the union's registered letter of 15 December 1983 were deemed to be a proper three calendar month notice of termination under art 30(a), the termination would only take effect on 15 March 1984. As such, the 1984 annual increment which was due to the confirmed employees on 1 March 1984 would still be payable as it had accrued during the currency of the 1982 agreement.

In the circumstances, we rule that the Industrial Court did not act without or in excess of jurisdiction when it ordered the company by the award no 143 of 1986 to pay the 1984 increment due to the confirmed employees under the 1982 agreement before their salaries were converted to salary scales under award no 63 of 1985.

The appeal is accordingly dismissed with costs. Deposit to the respondents on account of taxed costs.

Appeal dismissed.

Solicitors: *TM Varughese & Co; P Kuppusamy & Co.*

Reported by *Prof Ahmad Ibrahim*

New Straits Times (M) Bhd & Ors v Mohd Zainal Abidin bin Abdul Mutalib & Anor

SUPREME COURT (KUALA LUMPUR) – SUPREME COURT CIVIL APPEAL NO 356 OF 1988
HASHIM YEOP A SANI, HARUN SCJJ AND GUNN CHIT TUAN J
19 OCTOBER 1988

Civil Procedure – Injunction – Appeal against refusal to set aside interim injunction – Application to strike out paragraphs in statement of claim – Rules of the High Court 1980, O 18 r 19

This was an appeal from the refusal of the learned judge to set aside an interim injunction. The interim injunction as varied in effect directed that the appellant and another, each of them, by themselves or their servants or agents or any of them be restrained from describing Pertubuhan Kebangsaan Melayu by any name other than 'UMNO Baru' or 'Pertubuhan Kebangsaan